Supreme Court, U.S.
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NO. 92-1901

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GLENDALE MORE, JR., MICHAEL E. BURROWS AND JOHN COBURN, *Petitioners*,

v.

HAROLD FARRIER, et al., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT APPEALS FOR THE EIGHTH CIRCUIT

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May 24, 1993

QUESTIONS PRESENTED

1. Does the passage of the Americans with Disabilities Act (42 U.S.C. 12101, et. seq.) alter the level of scrutiny provided to discrimination claims under the Equal Protection Clause presented by persons who regularly use wheelchairs? This would require the Court to review its ruling in City of Cleburne v. Cleburne Living Centers, Inc., 473 U.S. 432 (1985).

[Note: Petitioner reserves the right to argue Question 2 in the event certiorari is granted on the above question, but does not include Question 2 among the reasons for the grant of certiorari].

2. Does the appeals court abuse its discretion in creating rationale for

prison regulations which were not articulated by the State?

LIST OF PARTIES and RULE 29.1 LIST

The parties to the proceeding below were the Petitioners: Glendale More, Jr., Michael E. Burrows and John Coburn. The Respondents before the Court were: Harold Farrier, Paul Grossheim, Crispus Nix, John Henry, Paul Hedgepeth, Jim Helling, John Emmet, Ken Wittry, Mike Anderson, Steve Davis, Glenn Jones, Larry Linton, Steve Young, Salace Gerdes, Roger Lawson, George Fenn and Tom Mannsheim. All Respondents were represented by the Attorney General's office for the State of Iowa.

There are no corporate respondents.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GLENDALE MORE, JR., MICHAEL E. BURROWS AND JOHN COBURN, Petitioners,

v.

HAROLD FARRIER, et al., Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable William H. Renquist, the Chief Justice and Associate Justices of the Supreme Court of the United States.

The Petitioners, Glendale More Jr., Michael E. Burrows and John Coburn, respectfully pray that a writ of certiorari issue to review of the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on January 27, 1993. A Petition for Rehearing was timely filed by

Petitioner and the denial of that petition for rehearing was on February 24, 1993.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 984 F.2d 269 (CA 8 1993) and is reprinted in Appendix A, p. A-2. The ruling of the United States District Court of for the Southern District of Iowa (Vietor, D.J.) has not been reported. It is reprinted in Appendix B, p. B-1.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the Petitioners brought this action in the Southern District of Iowa. On about July 16, 1990, the parties entered into a Consent Order resolving many controversies. See p. C-10, *infra*. The parties reserved certain issues for the Court's resolution. See p.C-24-25,

infra. On December 21, 1990, the Court approved the Consent Order. See p. C-1-9, *infra*. On October 30, 1991, the Court ruled that the Petitioners were entitled to Equal Protection and that Respondent's regulation bore no rational relationship to a legitimate governmental purpose. See p. B-5-11, *infra*. The Court did not rule on the applicability of a heightened scrutiny standard as it was "unnecessary". See p. B-8, *infra*.

On Respondents appeal, the Eighth Circuit on January 27, 1993, entered a judgment and an opinion reversing the Southern District's order, ruling that the rational basis standard was applicable and finding the Petitioners had not been subject to "invidious discrimination". See p. A-2-14, *infra*. A timely Petition

for Rehearing was filed by the Petitioners and that was denied on February 24, 1993.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fourteenth Amendment, Section 1. Equal Protection Clause. See p. D-1, *infra*.

42 U.S.C. §12101 et seq. Americans with Disabilities Act. See p. D-2-9, *infra*.

STATEMENT OF THE CASE

Glendale More Jr., Michael E. Burrows and John Coburn are inmates at Iowa State Penitentiary ("ISP") who regularly use wheelchairs. They brought a 42 U.S.C. Section 1983 civil rights action to resolve their rights and privileges of

access to the various programs and facilities at ISP.

At the time of the commencement of this action, the Petitioners were incarcerated in Cellhouse 217. They started their actions in 1986 and 1987. Under a previous Consent Order, that cellhouse was to be vacated as a regular living unit in or about April, 1985, and used only for emergencies. (See, Watson et al. v. Ray et al., 90 FRD 143, 150 (SD IA 1981). That Consent Order was entered after a finding that the conditions at ISP were unconstitutional. Watson, supra. This closing was a result of complaints concerning various health and sanitary conditions including plumbing and ventilation. (Watson, supra. at 148, 150, 157-158.) The time frame for vacating the

cellhouse was extended on a couple occasions.

During 1986 and 1987, the Petitioners brought several complaints concerning their denial of access to various parts of ISP, denial of privileges, unequal opportunity to advance on the "privilege level system", inappropriate restroom facilities and various assertions of discrimination, harassment and retaliation. (See Complaints, SD IA Civil Nos. 86-716-B, 86-891-B, 87-082-B, 87-501-B.) At the time More filed his lawsuit, he was complaining, in part, that he was the only inmate who's cell door was not wide enough for his wheelchair. (Complaint, SD IA Civil No. 87-501-B, ¶ 31.)

In December, 1987, the Petitioners were moved from Cellhouse 217 to the "Special

Needs Unit" of ISP. See, p. A-5, infra.) This unit was used for persons in wheelchairs, those recovering from illnesses and those inmates who needed separation from dangerous situations, such as self-abusive inmates or psychiatric inmates (Appellant's, Department of Correction Employees', Brief before the Eighth Circuit Court of Appeals, p. 6.) At the time of their transfer, the Petitioners were removed completely from the "privilege level system" provided all inmates at ISP and given a different set of rules of confinement. For example, although all other inmates in good standing at the ISP had in-cell personal television privileges, ISP chose to confiscate Petitioners' personal televisions. This reduction of privilege was normally limited to instance of inmate

hospitalization or severe disciplinary infractions. (Court of Appeals App. pp. 51, 54.) ISP chose to give inmates in the "Special Needs Unit" a community television. (Court of Appeals App. p. 23.)

The complaints of the Petitioners were consolidated. Through negotiations, the Petitioners obtained a Consent Order which recognized that Iowa State Penitentiary personnel would make some areas of the facility more accessible, would make some programs of the facility available and provided some privileges to Petitioners. (App. pp. C-10-29, infra.) In some areas there were accommodations or substitute access. In other areas there were no accommodations. For instance, the Consent Order did not provide access to all programs available to ambulatory inmates and it did not place Petitioners on the

"privilege level system." It did not provide "equality of opportunity" or "full participation".

The Consent Order left certain issues unresolved. It did not establish that the Petitioners were entitled to Equal Protection due to their physical limitations. In particular, it reserved for the Court's determination a ruling on that issue and the option of increased time out of the cell with community televisions or personal in-cell televisions like all other inmates.

In their complaints the Petitioners asserted that as persons who regularly use wheelchairs, they were entitled to Equal Protection. Further, they maintained this isolation and disparate treatment should be found to violate that right. They urged the Court to adopt the heightened

scrutiny standard for violation of their Equal Protection rights citing the Americans with Disabilities Act.

The Department of Correction employees maintained that the persons who regularly use wheelchairs were not similarly situated and where therefore not entitled to Equal Protection rights. In the alternative, they argued several reasons for disparate treatment. First, it was suggested the inmates of the Special Needs Unit should interact with one another (Affidavit of Defendant Nix, p. 90, filed June 27, 1998). Later, it was disclosed that Defendant Nix was informed that it might be beneficial for the wheelchair bound inmates to be forced out of their cells and be with other inmates on the unit." (Appellate Appendix App. pp. 58-59).

Then, other rationales were proposed to condone disparate treatment. Other suggestions included: its not good practice to have personal televisions in prison hospital settings; administrative convenience of not "dedicating" rooms to wheelchair bound inmates; and pressures on officers in administering the television privilege in this Unit should cable television hook-ups be provided.1

The United States Magistrate Judge's Report and Recommendation found that wheelchair-bound inmate housed in the Special Needs Unit were not similarly situated to the rest of the inmate population at ISP. (See, p. B-18, infra.) Further, the Magistrate Judge found that

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1 The only mention of cost was by Defendant's attorney in the Brief filed March 21, 1991. It was not in any affidavits.

assuming there were similarly situated persons, heightened scrutiny did not apply and the rational basis test was applicable. (See, p. B-22, infra.) Finally, the Magistrate Judge found the following rationally related governmental reasons present:

> [T]he need for wheelchair bound inmates to participate in social activity, administrative requirements relating to cell assignments in the SNU and the cost involved in wiring for Cable TV service. (p. B-22, infra.)

The United States District Court Judge rejected the Magistrate Judge's conclusion that the Petitioners were not similarly situated to the rest of the inmate population. (See p. B-7, infra.) The District Court did not rule on the requested heightened scrutiny standard as it was considered unnecessary. (p.B-8)

The District Court concluded, there was no rational relationship to a legitimate governmental purpose in the disparate treatment. (Ibid.)

The Eighth Circuit Court of Appeals panel found the Petitioner's were similarly situated with the other inmates. (p. A-10, infra.) The Court did not require a heightened scrutiny and instead applied the rational basis standard. (p. A-8, infra.) They further determined that there was no "invidious discrimination" present. (p. A-11, infra.) Accordingly, there was no Equal Protection violation.

The panel's ruling continued to indicate that Iowa State Penitentiary's rationale was one of prioritizing problems. (p.A-12-13, infra.) That ruling stated, "[O]n this record, the prison officials may rationally decide that installing cable

rationally decide that installing cable service in the cells of the Special Needs Unit is not worth the effort even though the cost of installation would be minimal."

A Petition for Renearing renewed the request that the Appeals Court adopt a heightened scrutiny standard and suggested the Department of Corrections employees had offered no credible and/or rational basis for differential treatment. The Appeals Court panel denied the Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's ruling that persons who regularly use wheelchairs are not a suspect class and that their claims should be reviewed with a rational basis test is in conflict with the Congressional directives included in the Americans with

Disabilities Act (42 U.S.C. §12101 et seq.) and this Court should determine a heightened scrutiny standard should be adopted.

The relationship between the passage of the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) and the proper application of the Fourteenth Amendment of the United States Constitution is an important question of federal law which has not been decided by this Court. Prior to the passage of that act, the Court had determined that disabled persons were not a suspect class for equal protection claims. *City of Cleburne v Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). The findings, the purposes and the remedial procedures of the American with Disabilities Act (herein referred to

as the ADA) all emphasize the necessity to review those decisions and adopt a heightened scrutiny standard.

The ADA has been heralded as a monumental piece of federal legislation. "The ADA is the most significant civil rights legislation since the Civil Rights Act of 1964. Its enactment will profoundly change the legal rights of individuals with disabilities." Jones, N.L., *Overview and Essential Requirements of the Americans with Disabilities Act*, 64 Temple L.R. 471 (1991). It has been called "a great leap forward" and a "reawakening". Thornburgh, D., *The Americans with Disabilities Act: What it Means to All Americans*, 64 Temple L.R. 375 (1991).

Its findings clearly state that 43,000,000 Americans are directly affected

by its enactment. 42 U.S.C. §12101(a)(1). As appropriately identified by Dick Thornburgh,

> Each time civil rights are enlarged in this county, they extend over the whole of our society. *All* Americans, not just minorities, are involved in every extension of such rights. The passage of the ADA is truly another emancipation, not only for the forty-three million Americans with disabilities who will benefit directly, but for the rest of us as well. Thornburgh, *supra* at 375.

The passage of the ADA involves truly important federal issues.

The presence of an important federal question is also supported by the specified purposes of the ADA. Its stated purposes include:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
> . . .

> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and,
>
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities. 42 U.S.C. § 12101(b)(1), (3) and (4).

Congress intended the ADA to present important and vital federal issues.

In passing the ADA, Congress found purposeful discrimination against people with disabilities. The ADA states:

> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem; . . .

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;
. . .

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individual to participate in, and contribute to, society; 42 U.S.C. § 12101(a)(2), (5) and (7).

This was similar to the findings of "history of unfair and often grotesque mistreatment" arising from "prejudice and ignorance" noted by some justices in *City of Cleburne, supra* at 454, 461.

In response to these findings, Congress stated the national goals:

> (8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; 42 U.S.C. § 12101(a)(8).

Congress concluded that qualified individuals with disabilities shall not "[b]e excluded from participation in or denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132. Congress has provided clear, unambiguous congressional

direction on how the nation should approach individuals with disabilities.

"In the ADA, Congress explicitly invoked its full authority to enforce both the fourteenth amendment and the Commerce Clause of the Constitution to reverse the regime of official discrimination and segregation on the basis of disability." Cook, T., *The Americans with Disabilities Act: The Move to Integration*, 64 Temple L.R. 393, 415 (1991). The congressional authority was listed in the Act's purposes. 42 U.S.C. § 12101(b)(4). As stated by Associate Professor Mikochik,

> In passing the ADA, Congress took the unusual step of setting forth its constitutional authority in the preamble, declaring that the ADA was an exercise of Congressional power to enforce the fourteenth amendment and to regulate commerce. This declaration was doubtlessly intended to underscore that Congress's

> reliance on these constitutional powers, which it received from the People expressly, was deliberate and, therefore, entitled to the broadest deference from coordinate branches of government. Mikochik, S., *The Constitution and the Americans with Disabilities Act: Some First Impressions*, 64 Temple L.R. 619, 619-620, (1991).

Congress intended its declared direction to influence decisions by the executive and judicial branches of government when addressing the concerns of persons with disabilities.

The text of the ADA directly counters the Court's previous rulings regarding the level of scrutiny applied to disability discrimination claims. It used specific language to find persons with disabilities as suspect classes. It also directly countered many of the Court's concerns presented in *City of Cleburne*, supra.

Regarding the definition of persons with disabilities as constituting a "suspect class", Congress found that persons with disabilities are "a discrete and insular minority". 42 U.S.C. § 12101(a)(7). This is the language of Chief Justice Stone in defining the suspect class. *United States v Carolene Products Co.*, 304 U.S. 144, 152-153 fn.4 (1938). Similarly, Congress further found that persons with disabilities were often discriminated against based on "characteristics beyond the control of such individuals". 42 U.S.C. § 12101(a)(7). This is similar to references in other cases regarding suspect classes. (See *Frontiero v Richardson*, 411 U.S. 677, 686 (1973) wherein the suspect class demonstrates "an immutable characteristic determined solely by the accident of birth" which the

burdening of which would seem to violate the concept of "legal burdens should bear some relationship to individual responsibility"). Congress specifically found the classifications of persons with disabilities resulted "from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society". 42 U.S.C. § 12101(a)(7). This directly counters the distinction drawn between physical disabilities and other suspect classes in *Frontiero*, supra at 686.

Congress specifically adopted the suspect class language from *Massechusetts Board of Retirement et al. v. Mourgio*, 427 U.S. 307, 313 (1976). There the Court stated that a suspect class is a "Discrete and insular" class that is "saddled with

such disabilities, or subjected to such history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. Ibid. Several of these same terms are echoed in the ADA: persons with disabilies are a "discrete and insular minority", who have been "subjected to a history of purposeful unequal treatment and relegated to a position of political powerlessness in our society". See 42 U.S.C. § 12101(a)(7).

The ADA specifically countered the statements contained in *City of Cleburne*, supra. In *City of Cleburne*, the Court stated:

> The Equal Protection Clause of the Fourteenth Amendment commands no State shall "deny to any person within its jurisdiction the equal

> protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Section 5 of the Amendment empowers Congress to enforce this mandate, but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. (Emphasis added.) *City of Cleburne*, supra at 439-440.

As previously noted, the ADA specifically invoked the Fourteenth Amendment, Section 5 provisions. 42 U.S.C. § 12101(b)(4). Further, as discussed *infra*, Congress has provided controlling congressional direction. Congress has requested judicial protection for persons with disabilities at a heightened scrutiny.

Congress further addressed the rationale of *City of Cleburne* in the ADA. The Court

in *City of Cleburne* decided that mentally retarded individuals were not a quasi-suspect class. Their several reasons included: (1) mentally retarded individuals are different in their ability to function in the everyday world and such differences are best addressed by the legislature (*City of Cleburne*, supra. at 442); (2) the legislative response has been limited and "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary" (Ibid. p. 443); (3) the mentally retarded are not politically powerless; and (4) the Court was reluctant to address the legislative difficulties in differentiating the variety of other groups of disabled.

In the Findings of the ADA, Congress found disability discrimination to be "a

serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). Persons with disabilities "occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. § 12101(a)(6). The disabled have been "subjected to a history of purposeful unequal treatment . . . based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(a)(7). "[T]he nations proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation . . . for such individuals." 42 U.S.C.

§ 12101(a)(8). This discrimination "costs the United States billions of dollars."

The Findings clearly demonstrate a national "goal" and "comprehensive national mandate" for the elimination of disability discrimination and the advancement of "full participation." 42 U.S.C. § 12101(a)(8). This provides a Congressional rejection to the first reason in *City of Cleburne*, supra.

Similarly, there is no longer a limited response to disability discrimination as referred to in the second reason of *City of Cleburne*, supra. The purposes of the ADA include "a clear and comprehensive national mandate" (42 U.S.C. § 12101(b)(1)) wherein "the Federal Government plays a central role" (42 U.S.C. § 12101(b)(2)). Congress has invoked "the sweep of congressional

authority, including the power to enforce the fourteenth amendment." 42 U.S.C. 12101(b)(4).

Congress noted that prior legislation concerning persons with disabilities was not sufficient. "[D]espite some improvements," the problem remained. 42 U.S.C. § 12101(a)(2). The ADA incorporated other legislative remedies. 42 U.S.C. § 12133. The ADA is prohibited from providing lesser protections. 42 U.S.C. § 12201(a). It specifically permits legislation of "greater or equal protection for the rights of individuals" with disabilities. 42 U.S.C. § 12201(b).

There is no longer a limited response to persons with disabilities. There is no longer the "continuing antipathy or prejudice" referred to in *City of Cleburne, supra.* at 443. Congress has

rejected the second rationale of *City of Cleburne*.

Congress specifically rejected the third reason of *City of Cleburne*, supra. It found disabled persons "often had no legal recourse to redress discrimination" (42 U.S.C. § 12101(a)(4), They are "a discrete an insular minority" (42 U.S.C. § 12101(a)(7) and "relegated to a position of political powerlessness in our society." Ibid.

Finally, the Court's concerns regarding the legislative difficulties of protecting the persons with disabilities has been answered. See p. 29, supra. The ADA is a comprehensive response to this area.

The Eighth Circuit Ruling, along with the Magistrate Judge, applied a rational basis test relying on *City of Cleburne, supra*. Congress has responded to this

issue and the ruling of *City of Cleburne*. This Court should review the *City of Cleburne* decision and find that persons with disabilities are entitled to a heightened scrutiny in their Equal Protection Clause claims. This is a recurring issue, which will be pursued around the country and needs this Court's attention.

Under the Americans with Disabilities Act, there is clear direction for the Court to intervene in these areas.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted. Petitioner reiterates that Question 2 is presented herein, not a as a reason for granting certiorari, but because in the posture of this case this is the only

opportunity for Petitioner to seek review of the ruling of the Eighth Circuit's and Magistrate Judge's deference to the state employee's proposed rationale. If the Petitioners are correct in the applicability of the heightened scrutiny standard, the matter should be remanded to the Appeals Court for appropriate disposition on the facts presented.

Respectfully submitted,

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-1468SIDM

Glendale More, Jr., et al.,

Appellees,

VS.

Harold Farrier, et al.,

Appellants.

Appeal from the United States District Court for the Southern District of Iowa

The petition for rehearing by the panel is denied.

February 24, 1993

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-1468

Glendale More, Jr.,	*	
	*	
Appellee,	*	Appeal from the
v.	*	United States
	*	District Court
Harold Farrier; Paul	*	for the Southern
Grossheim; Crispus Nix;	*	District of Iowa
John Henry; Paul	*	
Hedgepeth; Jim Helling;	*	
John Emmitt; Ken	*	
Wittry; Michael	*	
Anderson; Steve Davis;	*	
Glen Jones; Steve	*	
Young; Salace Gerdes;	*	
Roger Lawson; George	*	
Fenn; and Tom	*	
Mannsheim	*	
	*	
Appellants.	*	
	*	
Michael E. Burrows;	*	
John Coburn,	*	
	*	
Appellees.	*	

Submitted: November 12, 1992
Filed: January 27, 1993

Before FAGG, BEAM, and HANSEN, Circuit Judges.

BEAM, Circuit Judge.

Glendale More, Jr., an Iowa State Penitentiary ("ISP") inmate who regularly uses a wheelchair, brought this 42 U.S.C. section 1983 civil rights action on behalf of himself and two other wheelchairbound ISP inmates1 (collectively "appellees") to settle their rights and privileges at ISP. The only issue on appeal is whether the named Iowa prison officials violated appellees' rights to equal protection under the Fourteenth Amendment by refusing to install cable television service in their individual cells.2 The district

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1 The separate complaints filed by Glendale More, Jr., Michael E. Burrows, and John Coburn were consolidated into a single action below.

2 The district court settled all

court referred this issue to a magistrate judge who decided, based on stipulated facts, that appellees failed to prove a constitutional violation. On a de novo review of the record the district court rejected the magistrate judge's recommendation, found an equal protection violation, and issued injunctive and declaratory relief. We reverse.

I. BACKGROUND

The stipulated facts indicate that prior to December 1987,

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other issues in the case with a consent order that required, among other things, physical modifications to architectural barriers, assisted access to portions of the prison, access to certain prison programs and privileges, and additional privileges that differ from the privileges afforded to inmates in the general population. More v. Farrier, No. 87-501-B Consent Order (S.D. Iowa Dec. 21, 1990). The consent order reserved the in-cell cable television issue for resolution by the court.

appellees were incarcerated in Cellhouse 217, the only cellhouse in the ISP system that could accommodate wheelchair-bound inmates. While they were housed at Cellhouse 217, appellees, like all other inmates in good standing, were permitted to purchase television sets from approved distributors and were provided with cable television service in their individual cells.

Cellhouse 217 was subsequently closed by court order and all prisoners were relocated. Because of their physical disabilities, on December 17, 1987, ISP moved appellees to an area of the infirmary known as the Special Needs Unit. Unlike all other cells at ISP, the cells in the Special Needs Unit are not equipped with cable television service and the prison has refused to install

cable service in the individual Special Needs Unit cells. Cable service is necessary for adequate television reception at ISP.

Pursuant to the consent order, ISP provides appellees access to two cable televisions in the community room between 7:00 a.m. and 10:00 p.m. daily. Appellees report problems with viewing television in the community room, however, including disagreements over program selection, noise,3 second-hand smoke from other inmates, and the inability to take college credit classes on educational television if they choose to do so.

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3 According to the prison officials, the community room televisions have been equipped with head phones to screen out noise in accordance with an oral agreement between the parties. Affidavits of Crispus C. Nix, App. at 60.

Counsel for the prison stated at the settlement conference that the cost of running cable into appellees' cells was not the main reason for denying in-cell cable service. The prison officials proffered two other reasons for denying access to in-cell cable television in the Special Needs Unit. The district court rejected those reasons as not rationally related to the legitimate interests of the institution, and held that the prison officials violated appellees' equal protection rights by failing to provide them with in-cell cable television service.

II. DISCUSSION Because the parties stipulated the facts below, there are no factual issues on appeal. We conduct a de novo review of the district court's application of the law to the facts.

Mangels v. United States, 828 F.2d 1324, 1326 (8th Cir. 1987). Despite television's importance in modern society, appellees have no fundamental right to in-cell cable television, and wheelchair-bound inmates are not a suspect class. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 441-43 (1985). Accordingly, we review appellees' equal protection claim under a rational basis standard.4 Under this standard appellees prevail if (1) they are similarly situated with persons who are

---

4 Appellees argue that they are entitled to heightened scrutiny as a result of "increased federal and state concerns over the rights of handicapped individuals." Appellees' Brief at 13-14 (citing the Americans with Disabilities Act, 42 U.S.C. section 12101 and Iowa Code Chapt. 601A). These statutes do not, however, purport to alter the standard for constitutional equal protection claims.

treated differently by ISP, and (2) ISP has no rational basis for the dissimilar treatment. Moreland v. United States, 968 F.2d 655, 660 (8th Cir.) (en banc), cert. denied, 61 U.S.L.W. 3419 (1992).

The prison officials argue that appellees are not similarly situated with other inmates in good standing because wheelchairbound inmates present unique penological challenges. To support their argument, the prison officials cite difficulties with providing appellees access to prison programs and to certain areas of the prison that are open to more ambulatory prisoners. The problems that ISP may confront in providing appellees access to the chapel, gym, job sites, or other facilities, however, are irrelevant to the determination whether appellees are similarly situated to other inmates with

respect to in-cell cable television service. See Reed V. Reed, 404 U.S. 71, 76 (1971) (a classification must rest upon some ground having a fair and substantial relationship to the object of the case). Appellees are as capable of watching television in their cells as any other prisoner at ISP. The prison officials would not have to provide any special assistance for appellees to watch television in their own cells rather than in the community room. Accordingly, we find that appellees are similarly situated with other prisoners who have in-cell cable service for the purposes of this case.

Under the rational basis test, even where similarly situated persons are treated differently by the state, state action is presumed constitutional and

"will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961). We will uphold a challenged state action so long as it bears a rational relationship to a state objective not prohibited by the Constitution. See Stiles v. Blunt, 912 F.2d 260, 263 (8th Cir. 1990), cert. denied, 111 S.Ct. 1307 (1991). Not all government-created inequalities are forbidden by the Constitution. "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489 (1955). We cannot say that ISP has crossed that line in this case.

As indicated, prior to the court-ordered closing of Cellhouse 217, ISP

provided appellees with the same cable service as all other ISP prisoners. The closing of Cellhouse 217 necessitated moving appellees to the Special Needs Unit and created numerous access problems for appellees, including the deprivation of in-cell cable television. Appellees negotiated with the prison officials over most of the problems created by the closing of Cellhouse 217. The result of those negotiations is a Consent Order that mandates some physical reforms and obligates ISP to provide appellees with some privileges that are unavailable to other ISP inmates. Appellees' privileges include longer unlocked cell hours which allow appellees to watch the two cable televisions provided for them in the community room.

ISP is entitled to prioritize the

problems presented by the closing of Cellhouse 217 and to address those problems it judges most acute. See id. On this record, the prison officials may rationally decide that installing cable service in the cells of the Special Needs Unit is not worth the effort even though the cost of installation would be minimal. Although ISP has not provided appellees with in-cell cable service, the prison officials have provided appellees with substantially equivalent access to television a short distance from their cells. Thus, this case does not rise to the level of invidious discrimination proscribed by the Equal Protection Clause. Absent evidence of such discrimination, the federal courts should defer to the judgment of the prison officials. Timm v. Gunter, 917 F.2d 1093, 1099 (8th Cir.

1990), cert. denied, 111 S.Ct. 2807 (1991).

III. CONCLUSION

For the reasons discussed above, the decision of the district court is reversed.

A true copy.

Attest:

_____
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

GLENDALE MORE, Jr.,	:	
	:	Civil No. 87-501-B
Plaintiff,	:	4:87-CV70501
v.	:	
	:	
	:	JUDGMENT
HAROLD D. FARRIER, et al.,	:	
	:	
Defendants.	:	

This action came on for trial before the Court, Honorable Harold D. Vietor, Chief Judge of the Southern District of Iowa, presiding, and the issues having been duly presented on a stipulated record and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED

That the Plaintiff, Glendale More, Jr., Michael E. Burrows, and John Coburn are granted a Declaratory Judgment that the Defendants denied Plaintiffs their rights

to equal protection of the law by prohibiting cable television in Plaintiffs cells when cable television is available in the cell of all other Iowa State Penitentiary Inmates in good standing.

Further, the Plaintiffs, Glendale More, Jr., Michael E. Burrows and John Coburn, are entitled to a permanent injunction requiring Defendants to equip the Plaintiffs cells for receipt of cable television as is available for all other Iowa State Penitentiary Inmates in good standing and to restore to the Plaintiffs their television sets that were previously confiscated from them.

Further, the Plaintiffs, Glendale More, Jr., Michael E. Burrows, and John Coburn, claim pursuant to the Cruel and Unusual Punishment Clause, Due Process Clause and 29 U.S.C. 794 are dismissed.

Further, the Defendants are entitled to qualified immunity and the Plaintiffs prayer for money damages is denied.

Further, the Plaintiff, Glendale More, Jr., is hereby allowed reasonable attorney's fees and expenses, to be assessed as part of the costs against Defendants in the total sum of $5,232.04 together with interest thereon from December 16, 1991.

DATED this 17 day of January, 1992.

HAROLD D. VIETOR, Chief Judge
Southern District of Iowa

Clerk of Court

Approved as to form and content.

_____
George S. Eichhorn, Attorney
for Glendale More, Jr.

_____
Layne M. Lindebak, Assistant
Attorney General, Attorney
for the Defendants

COPIES TO COUNSEL

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

GLENDALE MORE, Jr.	*	
	*	
Plaintiff,	*	CIVIL NO. 87-501-B
v.	*	
	*	
HAROLD D. FARRIER, et al.,	*	**ORDER ACCEPTING IN PART AND REJECTING IN PART REPORT AND RECOMMENDATION, AND DECISION**
Defendants.	*	

MICHAEL E. BURROWS, et al.,	*	
	*	
Plaintiffs,	*	CIVIL NO. 88-353-B
	*	
v.	*	
	*	
HAROLD D. FARRIER, et al.,	*	
	*	
Defendants.	*	

Plaintiffs brought this action pursuant to 42 U.S.C. section 1983. Jurisdiction of the court is predicated on 28 U.S.C. section 1343.

A consent order was entered on

December 21, 1990, resolving all issues except the issue of availability of television in the cells of inmates who regularly use wheelchairs. That issue was reserved for ruling by the court on a stipulated record.

On April 18, 1991, the reserved issue was referred to Hon. Celeste F. Bremer, United States Magistrate Judge for the Southern District of Iowa, pursuant to 28 U.S.C. section 636(b)(1)(B). On June 13, 1991, Magistrate Judge Bremer filed a report and recommendation in which she recommends that plaintiffs More's, Burrows' and Coburn's complaints on the television issue be denied. The parties were granted to and including July 15, 1991, within which to file objections. Plaintiffs filed objections to the report and recommendation.

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.

23 U.S.C. section 636(b)(1).

I have made the required de novo review of the record, and I accept the report and recommendation of the Magistrate Judge, except as hereinafter provided.

I reject the Magistrate Judge's finding and conclusion that plaintiffs are not similarly situated to the rest of the inmate population at Iowa State Penitentiary, and I find and conclude that, for purposes of the issue presented, they are similarly situated to the rest of the inmate population.

I neither accept nor reject the Magistrate Judge's conclusion that a heightened scrutiny standard does not apply to this case, because I find it unnecessary to reach a conclusion on that issue.

I reject the Magistrate Judge's conclusion that the defendants' regulation (not allowing cable television in plaintiffs' cells) bears a rational relationship to a legitimate governmental purpose, and I find and conclude that there is no rational relationship to a legitimate governmental purpose.

It is my conclusion that the regulation prohibiting cable television in plaintiffs' cells, when cable television is available in the cells of all other ISP inmates in good standing, denies plaintiffs their rights to equal

protection of the law. I further conclude that plaintiffs are entitled to declaratory and injunctive relief requiring defendants to equip their cells for receipt of cable television and to restore to plaintiffs the television sets that defendants confiscated from them.

Because the portions of the report and recommendation that I accept include the Magistrate Judge's conclusions in respect to the claim of violation of the Hazen settlement, the due process claim and the qualified immunity defense, plaintiffs are not entitled to money damages.

Counsel for plaintiff More and defendants shall jointly prepare and submit a proposed order for judgment in accordance with the foregoing.

The parties shall, within the

time provided by statute and Local Rules, submit all supplemental papers relative to the issue of attorneys' fees. (Fee applications were filed after entry of the consent order. On April 2, 1991, plaintiffs' counsel filed a report stating that a tentative agreement concerning fees had been reached and requesting that ruling on the applications be stayed. They stated that they would report to the court once the fee issue had been resolved or a ruling was necessary. On April 18, 1991, I stayed ruling on the fee applications and directed counsel to notify me if a ruling was needed. I have not been notified.) The parties are strongly encouraged to now settle the amount of attorneys' fees. See Blum v. Stenson, 465 U.S. 886, 902 n.19 (1984); Hensley v. Eckerhart, 461 U.S. 424, 437

(1983); Moore v. City of Des Moines, 766 F.2d 343, 346 (8th Cir. 1985).)

DATED this 30th day of October, 1991.

HAROLD D. VIETOR, Chief Judge
Southern District of Iowa

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

GLENDALE MORE, Jr., et al.,	:	
Plaintiffs,	:	CIVIL NO. 87-501-B
vs.	:	REPORT & RECOMMENDATION
HAL FARRIER, et al.,	:	
Defendants.	:	

MICHAEL E. BURROWS, et al.,	:	
Plaintiffs,	:	
vs.	:	CIVIL NO. 88-353-B
HAL FARRIER, et al.,	:	
Defendants.	:	

This matter was referred to the undersigned United States Magistrate Judge for Report and Recommendation pursuant to 28 U.S.C. section 636(b)(1)(B) on April 18, 1991. The case began as a consolidated

civil rights action regarding the rights of inmates restricted to wheelchairs at the Iowa State Penitentiary (ISP) Negotiations resulted in a Consent Order which was approved and filed by the District Court on December 21, 1990.

The issues remaining to be resolved are whether the plaintiffs should be allowed to possess individual television sets wired to cable television in their cells while confined in the Special Needs Unit (SNU) of the ISP Health Care Unit, Cellhouse 207, and the amount of damages, if any. The parties filed a stipulated statement of facts and briefs on this issue. This matter is fully submitted.

FINDINGS OF FACT

The court adopts the stipulated statement of facts contained in plaintiffs' February 13, 1991 filing. The

court also adopts all affidavits, the diagram of the SNU, and additional statements of fact supplied by the parties. The facts relied upon in reaching a conclusion are set forth below.

1. The plaintiffs, Glendale More, Jr., Michael Burrows, and John Coburn are inmates at ISP who regularly use wheelchairs.

2. Prior to December 1987, plaintiffs purchased television sets through the ISP system. They were allowed to use them with cable TV service in their individual cells in Cellhouse 217. Cellhouse 217 was the only cellhouse at ISP which had cells on the ground floor, thus accommodating the wheelchair-bound plaintiffs.

3. Pursuant to the consent decree entered in Watson v. Ray, 90 F.R.D. 143

(S.D.Iowa 1981), Cellhouse 217 was banned as inmate housing. On or about December 17, 1987, defendants moved the plaintiffs to the "Special Needs Unit" (SNU) of Cellhouse 207, the ISP Health Care Unit.

4. At the time of the move, plaintiffs' television sets were confiscated and placed in storage because the cells in the SNU were not equipped with cable TV hook-ups and television reception inside ISP is virtually nonexistent without cable TV service.

5. Cable television is provided in the SNU community room. There are two television sets, with headphones, in the community room and plaintiffs are allowed to watch television between the hours of 6:00 a.m. and 10:00 p.m., or later.

6. Defendant Nix has been informed by the prison psychologist that it can be

beneficial for the wheelchair-bound inmates to be forced to get out of their cells and socialize in the community room with other inmates on the unit.

7. The SNU is used to house inmates being treated for physical and mental problems. Housing there is not intended to be a permanent living arrangement for recovering inmates. Since there is no cable TV service anywhere in the SNU except the community room, all rooms in the unit can be used for a variety of purposes allowing the prison authorities flexibility in efficient use of the unit.

8. Though it would be nominal, cost is a factor to the defendants in providing wiring for cable TV service to the plaintiffs' individual cells in the SNU.

CONCLUSIONS OF LAW

I. Equal Protection.

Plaintiffs claim that not being allowed to have cable television in their cells violates their fourteenth amendment right of equal protection. "The equal protection clause requires that similarly situated people be treated equally." Cordero v. Coughlin, 607 F. Supp. 9, 10 (S.D.N.Y. 1984).

Plaintiffs are wheelchair-bound inmates who, because of their disabilities, live in the penitentiary's new Health Care Unit. The cells in the rest of the 150 year old prison were not designed to accommodate wheelchair-bound inmates. Additionally, plaintiffs' disabilities do not permit them to participate in a variety of functions at ISP outside of the Health Care Unit. While housed in the SNU, plaintiffs have more out-of-cell privileges, larger cells,

and more accessible medical care than inmates in other cellblocks. The court finds that plaintiffs are not similarly situated to the rest of the inmate population at ISP because they have more privileges than inmates in other cellhouses. See Cordero v. Coughlin, 607 F. Supp. at 10. Therefore, plaintiffs' equal protection claim should be denied.

A. Proper Standard to be Applied.

Assuming plaintiffs are similarly situated so as to bring their claim into the context of equal protection, the proper standard to be applied depends largely on the nature of the class involved or the interest affected. Traditionally, courts apply one of three types of analysis: strict scrutiny, heightened scrutiny, or rational basis.

i. Strict Scrutiny.

Strict scrutiny is the appropriate test where either a suspect class is involved or a fundamental right is at stake. For the purposes of equal protection analysis, a suspect class is one which is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 28 (1973). The court finds that the plaintiffs do not fall within the definition of a suspect class.

For the purposes of equal protection analysis, a fundamental right is one which

is either implicitly or explicitly guaranteed by the constitution. See Hill v. Hutto, 537 F. Supp. 1185, 1188 (E.D. Va. 1982). The court finds that plaintiffs interest in possession of cable television in their cells is not a fundamental right.

ii. Heightened Scrutiny.

Plaintiff argues that an intermediate, or heightened scrutiny, standard should be applied because plaintiffs are physically handicapped. Traditionally, this standard has been applied to gender-based classifications, Craig v. Boren, 429 U.S. 190 (1976), or where an important, but not fundamental, right was involved. The court finds that neither of these classifications are applicable and that a heightened scrutiny standard does not apply to this case.

iii. Rational Basis.

The rational basis test is frequently applied to regulations in the social and economic field and when nonfundamental rights are involved. Assuming plaintiffs are similarly situated to the rest of the ISP population and the strict or heightened scrutiny tests are not applied, the court must determine if the regulation (not having cable television in their cells) bears a rational relationship to a legitimate governmental purpose.

The general rule is that official state action "is presumed valid and will be sustained if the classification drawn by the [regulation] is rationally related to a legitimate state interest." City of Clieburne v. Clieburne Living Center, 473 U.S. 432, 440 (1985). "[A]s long as there

is a legitimate government end and the means used are rationally related to that end, the Equal Protection Clause is not violated." Cordero v. Coughlin, 607 F. Supp. 9, 10 (S.D.N.Y. 1984).

Defendants assert several reasons that television is not provided in individual cells in the SNU: the need for wheelchairbound inmates to participate in social activity, administrative requirements relating to cell assignments in the SNU, and the cost involved in wiring for cable TV service.

The court finds that these reasons are rationally related to the legitimate interests of the institution. Therefore, plaintiffs' complaint alleging violation of their equal protection rights should be denied.

II. Violation of the Hazen

Settlement.

Plaintiffs claim that defendants are in violation of the privilege level system implemented at ISP pursuant to the Hazen v. Reagen, Civil No. 75-201-1 (S.D.Iowa Feb. 20, 1985), settlement decree. However, a consent decree cannot be enforced through a section 1983 action. DeGidio v. Pung, 920, F.2d 525, 534 (8th Cir. 1990). Therefore, plaintiffs complaint in this regard should be denied.

II. Due Process.

Plaintiffs claim that taking their television sets in December 1987 was a deprivation of their property without due process of law. A loss of property whether negligently caused by a State employee is not a loss "without due process of law" within the meaning of the fourteenth amendment if the State has

available an adequate or meaningful post-deprivation remedy. Parrot v. Taylor, 451 U.S. 527, 536-37 (1985). The confiscation of a prisoner's television is not a deprivation without due process if the State offers an adequate remedy. Phelps v. Anderson, 700 F.2d 147, 14849 (4th Cir. 1983). The Iowa Tort Claims process, Iowa Code Ch. 25A, provides an adequate and meaningful post-deprivation remedy. Walker v. Scurr, 617 F. Supp. 679, 681 (S.D. Iowa.1985).

Plaintiffs have an adequate post-deprivation remedy under the Iowa Tort Claims Act. Therefore, plaintiffs' claim in this regard should be denied.

IV. Qualified Immunity.

Defendants are entitled to qualified immunity as their actions in denying plaintiffs access to cable television in

their individual cells did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 80 (1982). Therefore, plaintiff's prayer for money damages should be denied on the basis of qualified immunity.

V. Conclusion.

IT IS RESPECTFULLY RECOMMENDED that plaintiffs' complaint be denied as their constitutional rights have not been violated and defendants are entitled to qualified immunity from any money damages.

IT IS ORDERED that the parties have until July 15, 1991 in which to file their objections to this report and recommendation. Any objections filed must identify the specific portions of the report and recommendation to which the

objections are made, and set forth the basis for such objections. See Fed. R. Civ. P. 72. Failure to timely file objections may constitute a waiver of a party's right to appeal. Thomas v. Arn, 474 U.S. 140 (1985).

IT IS SO ORDERED.

Dated this 13th day of June, 1991.

CELESTE F. BREMER
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

GLENDALE MORE, Jr., * CIVIL NO. 87-501-B

Plaintiff, * RULING AND ORDERS

vs. *

HAL FARRIER, et al., *

Defendants.

MICHAEL E. BURROWS, et al., *

Plaintiffs, * CIVIL NO. 88-353-B

vs. *

HAROLD FARRIER, et al., *

Defendants. *

The parties to this action have submitted a proposed Consent order for approval by the court. Plaintiffs Michael E. Burrows and John Coburn, who signed the Consent Order, object to it. These

objections are attached to a letter from Burrows and Coburn to me dated July 23, 1990. These objections followed objecting letters from Burrows and Coburn dated July 8 and 9, 1990, which I received after I had dated and signed the Consent Order, but before I filed it. Because of the letters, I have continued to withhold filing of the Consent Order to fully consider the Consent Order and objections. Their objections are discussed below.

Accessibility of bathrooms. Burrows and Coburn say the bathroom facilities in Unit 207, where wheelchair inmates are housed, are inadequate. Although they have grab bars and are large enough to accommodate a wheelchair, the toilet seat is six inches below the seat level of a wheelchair, and the sink is enclosed at the bottom, restricting approach by a

wheelchair. Section C (2) of the proposed Consent Order requires defendants to take any necessary steps to see that toilet facilities in housing units for inmates regularly using wheelchairs are of "sufficient size...". This includes toilet seat heights.

The objection regarding the sink can be addressed under the provisions of section C (4) of the Consent Order, in which the defendants agree to make "minor" modifications to the facility to better accommodate mobility-impaired inmates.

Burrows and Coburn also object that the decree does not require that the gym bathroom be made wheelchair accessible. This is correct. The decree only requires defendants to determine if that bathroom "is" accessible, and if it is, to install grab bars for wheelchair users. Section C

(4) may be used to seek a widening of doorways and to make other changes to improve accessibility.

Burrows and Coburn object that the bathroom used by inmates in the visiting area is not accessible. The decree provides that this bathroom need not be accessible as long as the wheelchair inmates are housed in Unit 207, which is in the same building. This is reasonable.

Hobbycraft. Burrows objects that defendants were willing to allow him to use the hobbycraft shop until the consent decree was signed by the parties. Then his request was denied, citing the proposed settlement. The proposed decree does not address access to the hobbycraft shop, except to state that a system of organized "inmate assistance" need not be provided to give access to it. It also

specifically allows wheelchair inmates "in-cell hobbies." The proposed decree does not bar access by a person who does not need such organized assistance from staff, and the copy of an inmate memo supplied by Burrows shows that he had agreed not to request staff assistance in gaining access. The system set up for compliance with the decree on pages nine and ten could be used if Burrows feels defendants are misreading the agreement.

Level System. Iowa State Penitentiary has in place a "level system," in which inmates obtain certain privileges by achieving "levels." These include "honor lifer" status. Burrows and Coburn object that mobility-impaired inmates who are housed in Unit 207 are permanently level II, and thus cannot achieve greater privileges, including a

number which are available to honor lifers. On pages seven through nine of the proposed decree is a list of privileges to be allowed those using wheelchairs. The decree provides that these listed privileges will no longer be allowed if the prison is sufficiently remodeled to allow integration of wheelchair inmates into general population. It is thus clear that negotiations for the settlement involved a tradeoff of the listed privileges for the level system. In view of this, and the court's conclusion below that the settlement was fairly arrived at, this objection is rejected.

Personal (in cell) televisions. The decree provides that this issue is reserved for trial on a stipulated record. Objections that personal televisions are

not allowed in Unit 207, but are allowed elsewhere, are therefore irrelevant.

Representation. Burrows and Coburn have been represented by capable and conscientious members of the bar. Counsel have represented that they explained the agreement carefully to each plaintiff. The settlement was reached at a settlement conference in Des Moines before Magistrate Judge Longstaff. The conference lasted most of the day, and counsel have represented that both they and Magistrate Judge Longstaff explained the agreement and discussed it with plaintiffs personally. Minor modifications were made to the agreement in the course of the day, and the television issue was reserved for trial, showing that genuine negotiations were involved. Counsel for both Burrows and Coburn state that they believe the

settlement is in the best interests of their clients. It is also clear from the materials provided that extensive correspondence regarding the proposals was exchanged between counsel and client. The contention that Coburn and Burrows were not adequately represented is rejected.

The Consent Order meets federal constitutional standards. The objections of Burrows and Coburn are OVERRULED and the Consent order as signed by the parties is approved. It has been redated by me and is filed with this Ruling and Order.

IT IS ORDERED that the remaining uncompromised issue, that of personal television sets, shall be submitted to Magistrate Judge Longstaff in such a manner as he may direct. See his order of October 12, 1990.

The motions to withdraw by counsel

for Burrows and Coburn are DENIED.

IT IS ORDERED that the letters of Burrows and Coburn of July 8, 9 and 23, 1990, and the enclosures therewith be filed by the Clerk of Court.

Dated this 21st day of December, 1990.

HAROLD D. VIETOR, Chief Judge
Southern District of Iowa

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

GLENDALE MORE, Jr., Plaintiff, v. HAROLD FARRIER, et al., Defendants.	:	CIVIL NO. 87-501-B
MICHAEL E. BURROWS, et al., Plaintiffs, vs. HAROLD FARRIER, et al., Defendants.	:	CIVIL NO. 88-353-B CONSENT ORDER

In order to resolve the accessibility of wheelchair inmate issues presented in More vs. Farrier, et al., civil No. 87-501-B, filed in the United States District

Court for the Southern District of Iowa (Central Division) and similar issues presented in litigation by Michael E. Burrows and John Coburn, and to provide accommodation to the concerns of the Plaintiffs as persons regularly using wheelchairs at Iowa State Penitentiary, the parties have consented to the following Order:

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

A. This Order is binding upon Defendants, Harold Farrier, Paul Grossheim, Crispus Nix, John Henry, Paul Hedgepath, Jim Helling, John Emmitt, Ken Wittry, Mike Anderson, Steve Davis, Glenn Jones, Steve Young, Salace Gerdes, Roger Lawson, George Fenn, Tom Mansheim, Ronald G. Welder, Patti Wachtendorf, Fred Scaletta, Robert Washington and Judy

Taylor, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise.

B. 1. Defendants shall promptly adopt and implement policies and procedures and other steps necessary to ensure that their successors will receive actual notice, within a reasonable time after taking office, of the existence, provisions and obligations of this order.

2. Defendants shall promptly take all steps necessary to ensure that all current employees and subcontractors of the Iowa Department of Corrections, who have any responsibility for the care, custody or conditions of confinement of inmates regularly using wheelchairs at the

Iowa State Penitentiary receive actual notice of this order.

3. Defendants shall promptly adopt and implement policies, procedures and other steps necessary to ensure that all future employees and subcontractors of the Iowa Department of Corrections, who have any responsibility for the care, custody or conditions of confinement of inmates regularly using wheelchairs at the Iowa State Penitentiary receive actual notice of this order.

4. Defendants shall promptly take all steps necessary to ensure that all persons necessary to effectuate the provisions of this order receive actual notice of this order.

C. Accessibility of Iowa State Penitentiary

1. The Defendants shall make and maintain each cell or housing unit housing persons regularly using wheelchairs of sufficient size to allow the wheelchair to enter the cell or housing unit, turn around and/or move to the various parts of the cell or housing unit. Additionally, although placing two persons to a cell or housing unit may be a permitted practice, Defendants will use the additional space requirements of persons regularly using wheelchairs as one of the criteria in determining whether or not a person regularly using a wheelchair is placed in a two person cell or housing unit.

2. The Defendants shall make and maintain any toilet facility in a cell or housing unit housing persons regularly using wheelchairs of sufficient size and

with appropriate grab bars for wheelchair users.

3. The Defendants shall make and maintain medical facilities that are accessible to persons regularly using wheelchairs.

4. The Defendants shall make and maintain other reasonable minor improvements and modifications to those areas of Iowa State Penitentiary which can reasonably be made accessible to persons regularly using wheelchairs. Minor improvements and modifications, as used in this provision, include smoothing sidewalks, use of small ramps, placement of grab bars, and in some instances enlarging doors limited to $2,000 per year unless there is a capital appropriation for those projects.

a. It is understood that

Defendants cannot make Iowa State Penitentiary free of burdens and obstacles to persons regularly using wheelchairs, but Defendants shall make a good faith effort to identify and prioritize areas which minor improvements and modifications can reasonably be made.

b. The Defendants shall adopt or implement a system of receiving and reviewing input from persons regularly using wheelchairs as to proposed minor improvements and modifications to the various areas of Iowa State Penitentiary.

c. The Defendants shall review the bathroom in the Iowa State Penitentiary Gym to determine whether it is accessible to persons regularly using wheelchairs. If so, Defendants

shall place appropriate grab bars for wheelchair users.

d. The Defendants do not need to make the bathroom in the waiting room of the Iowa State Penitentiary Infirmary accessible nor do they need to place grab bars in it for so long as persons regularly using wheelchairs are housed in Cellhouse 207 or alternate accessible facilities are within a reasonable proximity.

5. The Defendants will develop and adopt a system whereby designated inmates or individuals will provide assistance to persons regularly using wheelchairs, so as to allow them access to areas of Iowa State Penitentiary which cannot reasonably be made accessible by minor improvements or modifications. The

designated inmates or individuals will receive some training in movement of people regularly using wheelchairs. The system will be made available any time the person regularly using a wheelchair is authorized to go to that area. This provision does include the gym, chapel and library but does not include the hobbycraft or education area.

6. The Defendants will adopt and implement policies, procedures and other steps necessary to provide persons regularly using wheelchairs the following access to library materials.

a. Defendants shall make available legal materials in the library under the same procedure as that accorded inmates who cannot personally go to the library because

of their segregation.

b. Defendants shall develop and maintain a system of reserving non-legal books and material consistent with that available to ambulatory inmates.

c. Defendants shall maintain the current system of providing two boxes of books and materials to the unit which houses persons regularly using wheelchairs.

d. Defendants shall develop and maintain a system of checking-out or loaning legal and non-legal books and materials available at the library for persons regularly using wheelchairs.

e. Defendants shall make available the annual inventory of legal publications available at the

library.

7. If any area not currently accessible to inmates in wheelchairs is modified or relocated so as to be accessible to wheelchairs, the provisions of this agreement which provide for special access to those areas shall no longer be in effect.

8. In any areas currently used or anticipated to be used by inmates in wheelchairs, Defendants shall not remove grab bars or ramps already installed unless such area is being renovated to increase accessibility to those inmates or unless the area will no longer be utilized by those inmates.

D. Ancillary Accessibility issues

1. Defendants agree when a medical determination is made to provide a person with a wheelchair, a medical determination

by the University of Iowa Hospital & Clinics will be requested as to the necessity of removable sides, removable footrests or any other particular design concerns. If determined by that medical authority to be necessary such particular design features will be provided. Defendants agree that they will schedule an appointment for Plaintiffs at the University of Iowa Hospital & Clinics for review of their particular design concerns.

2. Defendants agree upon any permanent or long term transfer, of persons regularly using wheelchairs, to provide the same or make comparable items available, for all items previously determined to be necessary to that particular person, including but not limited to, wheelchairs and specialized

beds.

3. Defendants agree to provide assistance in ingress and egress to the Iowa State Penitentiary van on trips of persons regularly using wheelchairs. Further, a medical determination will be made in consultation with security authority concerning the use of leg irons on any person regularly using wheelchairs. Defendants shall review the present system of transporting wheelchair inmates in the van to determine if other procedures pose less a risk to the inmates safety while still maintaining appropriate security

E. Accessibility to Programs and Privileges at Iowa State Penitentiary

1. Defendants shall provide and maintain the following privileges to all persons in good standing who are regularly using wheelchairs.

a. May participate in general population exercise. Exercise schedule will parallel the existing policy on the general yard schedule. Minimum of two hours per day.

b. Maximum of five (5) visits per visitor per month with no more than four (4) on weekends.

c. Full canteen.

d. Radio allowed in cell.

e. Two televisions will be provided for the unit which houses persons regularly using wheelchairs.

f. Eat in dining hall.

g. Work assignments allowed as available.

h. Telephone calls during yard.

i. Tape player allowed in cell.

j. In-cell hobbies, excluding leather craft.

k. Limited recreation in the unit.

l. Unlocked cells from 7:00 a.m. until 10:00 p.m.

m. In-unit telephone.

n. Extra yard Friday.

2. Defendants shall provide access to the gym with staff supervision for persons regularly using wheelchairs during summer months.

3. Defendants shall waive any work criteria or other criteria inapplicable to a person who regularly uses a wheelchair used in the determination of any benefits provided by the Defendant's Iowa State Penitentiary or the Department of Corrections.

4. The Court will decide the issue of availability of televisions in the cell of persons regularly using wheelchairs and

damages upon written record submitted by Plaintiffs. If televisions become available for use in individual cells/rooms, the provisions of paragraphs E(1)(e) and (E)(1)(l) will no longer apply.

5. If areas of the Iowa State Penitentiary are modified so that inmates in wheelchairs can be integrated into living units used by the general population, and the levels system and honor lifer system are available, the accommodations contained in paragraph 1 of this subsection will no longer apply.

F. Compliance

The parties recognize that the accommodation of wheelchair bound inmates in a facility not designed for them is a difficult problem requiring cooperation and understanding by both parties. The

parties agree that procedures should be encountered with.that spirit of understanding.

1. In order to encourage extrajudicial resolution of disputes arising from the settlement agreement, the following procedures regarding grievances, notice, and consultation must be complied with before any of the parties to this agreement resort to the Court for modification, interpretation, or enforcement of this agreement.

a. Inmate complaints regarding matters encompassed by this settlement agreement shall be grieved through the Department of Corrections grievance procedure. If the grievance procedure does not settle the complaint, or if the matter is not grievable, a person wishing to

resort to the judicial process or his authorized representative shall, at least 30 days prior to the application to the Court, give written notice to the Deputy Warden of Programs or his representative. The written notice shall specify the relief for which he intends to apply, and the nature of the event, occurrence, or circumstance upon which such application for relief will be based.

b. The Deputy Warden of Programs or his designate shall reply, within 15 days of receipt of the written notice, in writing to the party giving notice, and the parties or their representatives shall then meet to discuss the problem with a view to resolving it without the necessity of

resorting to the Court.

c. The parties agree that participation in these preliminary procedures will not limit any judicial remedies to which the parties might otherwise be entitled.

DATED this 21st day of December, 1990.

HAROLD D. VIETOR, Chief Judge
Southern District of Iowa.

APPROVED AS TO FORM AND CONTENT

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UNITED STATES CONSTITUTION AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. Sections 12101 et seq.

"Americans with Disabilities Act"

Section 12101. Findings and purposes

(a) Findings

The Congress finds that--

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education,

transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and

relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6)census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly

indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter-

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination

faced day-to-day by people with disabilities.

42 U.S.C. Section 12132

12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. Section 12133

12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this

title.

42 U.S.C Section 12201

12201. Construction

(a) In general

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) Relationship to other laws

Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures, of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are

afforded by this chapter. . . .

Supreme Court, U.S.
FILED
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(2)

No. 92-1901

In The

Supreme Court of the United States

October Term, 1992

GLENDALE MORE, JR., MICHAEL E. BURROWS, and JOHN COBURN,

Petitioners,

v.

HAROLD FARRIER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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STATUTE:

Americans with Disabilities Act, 42 U.S.C. § 12101 . . .1, 2

STATEMENT OF THE CASE

Respondents have no serious disagreement with the Petitioners' statement of the case. However, the facts of the case were part of the stipulated record before the Eighth Circuit, *More v. Farrier*, 984 F.2d 269 at 270 (8th Cir. 1993), and Petitioners do not confine themselves to the record before the Eighth Circuit. The facts discussed by the Eighth Circuit adequately explain the positions of the parties and Respondents adopt those.

For example, the Petitioners indicate that the Consent Order did not provide "equality of opportunity" or "full participation." (Petition for Writ of Certiorari. pp. 8-9). However, the Court of Appeals found that the Consent Order "mandates some physical reforms and obligates ISP to provide Appellees with some privileges that are unavailable to some ISP inmates." 984 F.2d at 271. The Petitioners' Statement of the Case accurately describes those matters relevant to the narrow issue before the Court of Appeals and before this Court. The Eighth Circuit concluded that "the prison officials have provided Appellees with substantially equivalent television a short distance from their cells." 984 F.2d at 272.

REASONS FOR DENIAL OF THE PETITION

No New Issue of Federal Law Is Presented

The Petitioners challenge the Eighth Circuit's use of the rational basis standard of review under the Equal Protection Clause in a case involving physically handicapped individuals. Petitioners argue that the passage of the Americans with Disabilities Act, (42 U.S.C. § 12101, et

seq.) (ADA) requires the use of a heightened scrutiny analysis to determine whether the Equal Protection Clause has been violated. Petitioners are inmates at the Iowa State Penitentiary who, because they are wheelchair-bound, have been placed in an area of the penitentiary which is not wired for in-cell cable television like the remainder of the cellhouses. This housing assignment is necessary because no other area of the penitentiary provides unassisted access to the prison yard. In lieu of in-cell cable, the prison officials make available to these three inmates, two cable televisions in the community room between the hours of 7:00 a.m. and 10:00 p.m. daily. *More*, 984 F.2d 269, 270.

The only question before the Court of Appeals was whether this practice constitutes invidious discrimination under the Equal Protection Clause. Petitioners have never and do not now allege a violation of the ADA. The Petitioners' other claims under the Rehabilitation Act of 1973 (29 U.S.C. § 794a) and the Eighth Amendment were dismissed by the district court and not appealed. (Petition for Writ of Certiorari, Appendix, B-2).

The Court of Appeals, citing *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441-43, 105 S.Ct. 3249, 3255-56, 87 L.Ed.2d 313 (1985), found that the rational basis standard applied and rejected the Petitioners' argument that the ADA mandated a basis to apply "heightened scrutiny." The Eighth Circuit said:

> Appellees argue that they are entitled to heightened scrutiny as a result of increased federal and state concerns over the rights of handicapped individuals. Appellees' Brief at 13-14 (citing the Americans with Disabilities Act, 42

> U.S.C. § 12101 and the Iowa Code Chapter 601A). These statutes do not, however, purport to alter the standard for constitutional equal protection claims.

More, 984 F.2d 269, 271, n. 4.

The issue presented here is no different from that presented in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441-43 (1985). This Court in *Cleburne*, citing recent congressional legislation dealing with the mentally retarded, found that the existence of the "distinct legislative response both national and state, to the plight of those who are mentally retarded . . . belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *Cleburne*, 473 U.S. at 443-4.

In contrast, the Petitioners here attempt to use the extensive congressional findings with respect to the handicapped to *establish* the need for heightened judicial scrutiny under the Equal Protection Clause. The passage of the ADA shows that the handicapped are not politically powerless in the sense that they have no ability to attract the attention of lawmakers. *Cleburne*, 473 U.S. at 445. The Court, in *Cleburne*, has rejected heightened scrutiny status for a similar group, the mentally retarded, when significant legislation has been passed to ease their plight and which provides a remedy for grievances.

> To withstand Equal Protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose.

City of Cleburne, 473 U.S. at 446.

The issue need not be revisited in this case with respect to the physically handicapped.

CONCLUSION

Petitioners present no issue of federal law which has not been, but should be decided by this Court, nor is there a question which has been decided in a way that conflicts with applicable decisions of this Court. Supreme Ct. R. 10. The petition should be denied.

Respectfully submitted,

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